Petition

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81-591

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NO.

JOSEPH FREGLETTE,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION—SECOND DEPARTMENT

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QUESTIONS PRESENTED

Whether a police officer has the right to arrest and search based upon information supplied by an unknown untested informant whereby the first portion of said information proves to be inaccurate.

TABLE OF CONTENTS

PAGE

Jurisdiction..... 2

Questions Presented..... 2-3

Constitutional Provisions Involved..... 3

Facts..... 3-5

The Trial..... 5

Argument:

POINT I: THE WARRANTLESS SEARCH OF THIS CASE WAS NOT BASED UPON PROBABLE CAUSE BECAUSE THE UNTESTED INFORMANT WAS INSUFFICIENT. IN ADDITION, THERE WAS NO DANGER TO THE POLICE OFFICER WHICH WOULD JUSTIFY AN IMMEDIATE FRISK..... 10-11

Conclusion..... 11

Order on Appeal from Judgment of Conviction..... 12-13

TABLE OF AUTHORITIES

	PAGE
Terry v. Ohio, 392 U.S. 1 1968.....	6
Adams v. Williams, 407 U.S. 143 1972.....	6
United States v. Oates, 560 F.2d 45 (2nd Cir. 1977).....	6
United States v. Magda, 547 F.2d 756 (2nd Cir. 1976).....	6
Aquilar v. Texas, 378 U.S. 108 1964.....	8
Spinelli v. Texas, 393 U.S. 410 1969.....	8
People v. Steward, 41 NY2d 65, 66.....	8
People v. Prichillo, 41 NY2d 759.....	10
People v. Bernard, 41 NY2d 763.....	11

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

NO.

JOSEPH FREGLETTE,

PETITIONER,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

Petitioner, JOSEPH FREGLETTE, respectfully prays that this Court issue a writ of certiorari to review the order of the Supreme Court of the State of New York, Appellate Division, Second Department, dated March 23, 1981, which affirmed Petitioner's conviction rendered by a judgment of the Supreme Court of the State of New York, County of Kings, on June 6, 1980,

convicting him of Criminal Possession of a Weapon in the Third Degree. The Petitioner was tried to a jury and was sentenced to from three (3) to six (6) years imprisonment, as a Second Felony Offender.

The Court of Appeals of the State of New York by Certificate dated May 15, 1981, declined to grant a further appeal to that Court. The Appellate Division affirmed without opinion.

JURISDICTION

Jurisdiction in this Court is invoked under Title 28, U.S. Code, Section 1257(3) and Rule 19, Subdivision 1 of the rules of this Court. The judgment sought to be reviewed is the judgment of the Supreme Court of the State of New York, Appellate Division, dated March 23, 1981.

Jurisdiction is also alleged under the Fourth Amendment dealing with illegal search and seizure.

QUESTIONS PRESENTED

Whether a police officer has the right to arrest and search based upon information supplied by an unknown tested informant whereby the first portion of said information proves to be inaccurate.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional issues presented are whether the petitioner's rights under the search and seizure sections of the Fourth and Fourteenth Amendments were violated.

FACTS

This case involved a hearing to suppress evidence wherein the defendant contended that a weapon was taken from him as a result of an illegal search and seizure. The Court denied the motion to suppress and the evidence which then came in at the trial of of this action, essentially was identical to that adduced at the suppression hearing.

The questions which thus were presented were, whether the evidence was sufficient to show probable cause to justify the arrest and search and, whether the same evidence was enough to prove the petitioner's guilt.

At the hearing,it was established that police officer, Thomas Ventriglio, was in his patrol car on December 13, 1978, when a young man flagged him down and told him that two men were passing a gun back and forth at a local bar.

The informant was subsequently identified as Anthony Sabella, and he had advised the officer that one of the men was about 6 feet tall and weighed about 225 lbs. and was wearing a blue windbreaker, while the other man was only described as being a little shorter. In addition, one of the men had told Sabella to get out of the bar because the place was going to blow up (H 3-6)*

It was then about 3:15 am in the morning and the officer proceeded to the bar, after calling for assistance. When he arrived, he noticed a man coming out of the premises who fit the description of the taller man. The officer drew his revolver and approached the individual and told the individual that he was under arrest. At that point, Sabella, who had accompanied the officer to the bar, said that the individual was one of the men, so the police officer handcuffed him. However, a search produced no weapon whatsoever (H 10-11).

The informant guessed that the other man must be the one with the gun so with his gun still drawn, the officer entered the bar and saw the bartender, the petitioner and a female.

*Numerical references prefaced by the letter "H" refer to original minutes of the Hearing. References with letter "T" refer to trial minutes.

The petitioner looked suprised and made a quick move to the area of his waistband (H 13). The officer promptly ran over to the petitioner, arrested him, pulled him off the bar stool, placed him against the wall and proceeded to frisk him. The weapon was then recovered and it was established that prior to the actual frisk, the officer could not observe the weapon or anything that even looked like a weapon (H 26). A back-up officer was not even sure where the gun came from (T 153-154).

The Court denied the motion to suppress (H 26).

THE TRIAL

The same evidence that was developed at the hearing was introduced at the trial inasmuch as the officer gave essentially the same testimony (T 59-69). In addition, two members of the back-up team testified as well and their testimony was mostly cummulative. A ballistic expert testified that the gun recovered from the petitioner was operable (T 72). The youth who had initially flagged down the police car, Anthony Sabella, did not testify at the trial.

POINT I

THE WARRANTLESS SEARCH OF THIS CASE WAS NOT BASED UPON PROBABLE CAUSE BECAUSE THE UNTESTED INFORMATION SUPPLIED BY THE INFORMANT WAS INSUFFICIENT. IN ADDITION, THERE WAS NO DANGER TO THE POLICE OFFICER WHICH WOULD JUSTIFY AN IMMEDIATE FRISK.

This Court has unmistakenly set down the standards involving a police officer's right to pat someone down under the doctrine of the quick frisk or stop and frisk, and the case involving a situation where the frisk for weapons is necessary in order to protect the safety of the police officer. Terry v. Ohio, 392 U.S. 1 1968; Adams v. Williams,407 U.S. 143 1972; U.S. v. Oates, 560 F.2d 45, (2nd Cir. 1977); U.S. v. Magda, 547 F.2d 756, (2nd Cir. 1976).

In the case at bar, there was no question of safety involved, since the police officer did not see a glint of metal, or the reaching of the petitioner for anything which would have remotely been viewed as a weapon.

It was clearly established that the weapon was not visible prior to the frisk (H 22). This Court recognized the great indignity attendant to the type of search or frisk involved where an officer walks up to a person, with no clearly established cause, and subjects that person to a search in a public area.

> "Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a 'petty indignity'. It is a serious intrusion upon the sanctity of the person,...and it is not to be undertaken lightly." Terry Ohio, supra, at pages 16-17.

In this case, the conduct of the police officer, is the kind of conduct, which normally presents a great danger to the public and it is very lucky that there were no other people in the bar. This reminds one of the days of the "Old West" when a marshal comes into a crowded Saloon, goes up to a cowboy with his gun drawn, brandishing him of a wrongdoing.

It is respectfully suggested that especially where the police officer's attempt to verify the information given to him by the informant proves unsuccessful, he was totally unjustified in entering the bar and restricting the liberty of the petitioner without first making some type of orderly inquiry.

We cannot allow the police to take extraordinary steps as to arrest people at gun-point and handcuff them without any objective or reasonable basis for doing so; just because an informant has given the officer information, there is no reason to allow the officer to engage in such conduct where the information is not verified. Long ago, this Court set standards in situations involving search warrants where at least an impartial judge passed upon the proposed conduct of the police officers.

Aquilar v. Texas, 378 U.S. 108 1964; Spinelli v. Texas, 393 U.S. 410 1969. Those cases and a long line of decisions, thereafter established rules and regulations concerning inaccurate information provided by informants who were not known to the police officer and who had not proved reliable in the past.

In cases where no impartial judge at least gives his approval to the prospective arrest or search, rules governing the conduct of the police should be more restrictive. Certainly, there should be a requirement that an officer should do more than simply take the information and act upon it.

We realize that each case rests upon its own facts and that generally speaking, courts have to apply those principles to those facts, but as the Court of Appeals of the State of New York indicated, the governing principles are clear. People v. Steward, 41 NY2d 65, 66;

> "Simply stated the proper analysis in cases of this nature is to examine the predicate for the police action and then determine whether or not that predicate justified the extent of the official intrusion on the individual. Thus, the predicate established defines the slope of permissible police conduct."

As that Court indicated, the principle issue is whether or not the police had sufficient knowledge to

justify the intrusion on the privacy of the people concerned. We would argue that the facts at bar gave the police officer no more than the Court in Steward indicated the police officer should have in that case, that is, the right to engage in the common-law power of inquiry rather than a gun-point search and arrest.

In this case, when the police officer was first stopped, he was confronted with a young man who gave him information, nothing that specific and concerning which the officer had no previous knowledge. He had no previous acquaintance with Sabella, yet when he approached the bar he drew his revolver and immediately arrested the individual who exited from those premises. He told the man he was under arrest without ever even asking him any questions, he handcuffed him and then the officer searched his prisoner. But to his dismay, no weapon was found (H 10-11). Then Sabella told the officer that the other man inside must have the gun. Certainly, the officer was required to act with caution because his initial verification of the information Sabella gave him proved faulty.

The police officer exhibited no greater caution inside the bar than he did outside the bar and as soon as the petitioner made a slight move, the officer raced across the bar, pushed him off the stool, and placed him up against the wall (H 13, H 26). His gun had already been drawn before he even rushed into the bar. It is no wonder that the petitioner had a suprised look on his face because, after all, he was faced with an officer coming after him at 3:00 in the morning. The petitioner was not doing anything wrong, he was in a legitimate place having the right to be there and anyone would be just as suprised as the petitioner.

In fact, rather than making a supposed quick move to his waistband area, it is easy to imagine that many other reasonable people, not knowing the person coming at them was a police officer, would take more extraordinary action to defend themselves. It is just as consistent with the facts here, that the person could have believe he was going to be a victim of an assault or a robbery. It must be remembered that it was 3:00 in the morning and the bar was empty. There are other cases that have been decided according to federal standards, where bulges which appear to be guns have justified a search, see People v. Prichillo, 41 NY2d 759, but where the object did not actually look

like a gun, a suppression was granted.

People v. Bernard, 41 NY2d 763. In this case, the officer did not even see a bulge and he had no reason to believe petitioner had a gun or any other kind of weapon.

It is suggested that when the police officer pulled petitioner from the bar stool and placed him under arrest, he had no articulable information that petitioner had a weapon on him or that petitioner had engaged in or was engaging in any criminal acts which would justify an arrest or search.

It is most respectfully suggested that in order to deter police conduct of the nature found in this case, which conceivably could easily result in injury or worse, this Court should grant certiorari.

CONCLUSION

THE WEAPON TAKEN FROM APPELLANT WAS OBTAINED IN VIOLATION OF THE CONSTITUTIONAL PROTECTIONS AGAINST UNREASONABLE SEARCHES AND SEIZURES. THUS, THE JUDGMENT SHOULD BE REVERSED AND THE INDICTMENT DISMISSED.

Respectfully submitted,

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At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on March 23, 1981.

HON. VINCENT D. DAMIANI, Justice Presiding,
HON. DAVID T. GIBBONS,)
HON. CHARLES MARGETT,) Associate Justices
HON. FRANK D. O'CONNOR.)

The People of the State of New York,

Respondent,

v.

Joseph Freglette,

Appellant.

ORDER ON APPEAL FROM JUDGMENT OF CONVICTION

In the above entitled action, the above named JOSEPH FREGLETTE, defendant in this action, having appealed to this court from a judgment of the Supreme Court, Kings County, rendered June 6, 1980;

and the said appeal having been argued by Irving Anolik, Esq., of counsel for the appellant, and argued by Stewart O'Brien, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed, and it is further

ORDERED that this case is hereby remitted to the Supreme Court, Kings County, for further proceedings pursuant to CPL 460.50 (subd 5).

Enter:

IRVING N. SELKIN

Clerk of the Appellate Division

Opposition

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No. 81-591

IN THE

Supreme Court of the United States

October Term, 1981

JOSEPH FREGLETTE,
Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

Table of Authorities i

Preliminary Statement 1

Jurisdiction 1

Statement of Facts 2

POINT I—The Police Officer's Conduct Was Justified By The Eyewitness Account And The Officer's Corroborating Observations 3

CONCLUSION:

The petition for a writ of certiorari should be denied in all respects 6

TABLE OF AUTHORITIES

Cases:

Aguilar v. *Texas*, 378 U.S. 108 (1964) 4

Pendergast v. *United States*, 416 F.2d 776 (D.C. Cir.), *cert. denied*, 395 U.S. 926 (1969) 4, 5

Pennsylvania v. *Mims*, 434 U.S. 106 (1977) 5

People v. *Chestnut*, 51 NY2d 14 (1980) 5

People v. *Flanagan*, 56 App. Div.2d 289 (1st Dept. 1977) 4

People v. *Hicks*, 38 NY2d 90 (1975) 4

People v. *Hyter*, 61 App. Div.2d 990 (2d Dept. 1978) 4

Spinelli v. *United States*, 393 U.S. 410 (1969) 4

Terry v. *Ohio*, 392 U.S. 1 (1968) 5

PAGE

United States v. *Easter*, 552 F.2d 230 (8th Cir.), *cert. denied*, 434 U.S. 844 (1977) 4, 5

United States v. *Gagnon*, 635 F.2d 766 (10th Cir. 1980) 4, 5

United States v. *Salvucci*, 448 U.S. 83 (1980) 5

Statutes:

28 U.S.C. § 1257(3) 1

New York Penal Law § 70.06 (McKinney 1980-81 Supplement) 1

New York Penal Law § 240.50 (McKinney, 1980) .. 4

New York Penal Law § 265.02 (McKinney, 1980) .. 1

Preliminary Statement

Petitioner, Joseph Freglette, seeks from this Court a writ of certiorari to review the order of the Supreme Court of the State of New York, Appellate Division, Second Department, dated March 23, 1981, which affirmed without opinion a judgment of the Supreme Court of the State of New York, County of Kings, rendered June 6, 1980, convicting petitioner after a trial by jury of Criminal Possession of a Weapon in the Third Degree (*New York Penal Law* § 265.02(1) [McKinney, 1980]), and sentencing him thereon, after adjudication as a second felony offender (See, *New York Penal Law* § 70.06 [McKinney 1980-1981 Supplement]), to a term of imprisonment of, at least three, but not more than six years. Leave to appeal to the New York Court of Appeals was denied on May 15, 1981.

By Kings County Indictment Number 106 of 1979, petitioner was charged with the crime of Criminal Possession of a Weapon in the Third Degree; to wit: a loaded .38 caliber revolver on December 19, 1978.

On August 20, 1979, a hearing was held on petitioner's motion to suppress the .38 caliber revolver before the Honorable Gilbert Ramirez. That motion was denied. On April 29, 1980, petitioner's trial before the Honorable Robert S. Kreindler concluded with a guilty verdict to the single charge, returned by a jury. On June 6, 1980, sentence was imposed by Justice Kreindler as aforementioned.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3) and Rule 19, Subdivision 1 of the Rules of this Court.

Statement of Facts

At the hearing to suppress the physical evidence, Police Officer Thomas Ventriglio testified that on December 19, 1978, at approximately 3:15 a.m. he was on patrol in uniform in the area of 86th Street and 7th Avenue, Brooklyn (S.5-6).* The officer saw a white male waving to the officer, and engaged in a conversation with him (S.6-7). The man, whom Ventriglio later learned to be one Anthony Sabella, stated that two men were handing a gun back and forth (S.5, 9). The officer requested and received from Sabella an identification of each of the men. He was informed by Sabella as well that the place of occurrence was a tavern, the "Whisper Inn", located some fifty feet from the place where they were talking (S.7, 9).

In their conversation, Sabella described one of the two men as weighing about two hundred twenty-five pounds and wearing a blue windbreaker. The other man was described as a little smaller. Sabella told the officer that one of the two told Sabella he had better leave the tavern because they were going to blow the place up (S. 9). Ventriglio then radioed for assistance (*Id.*).

The officer then observed a man wearing a blue windbreaker and weighing about two hundred twenty-five pounds exit the lounge and position himself at the front door. Sabella, who had remained with the officer, told Ventriglio that this man was the one he had previously described (S.10). Ventriglio exited his patrol car and approached this individual with gun drawn and told him to freeze. The officer told him he was under arrest, frisked his outer clothing and handcuffed him. The officer did not find the gun (S.10-11). Sabella told the officer that the other fellow must have it (S.11).

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* Numbers in parentheses preceded by the letter "S" refer to the Suppression hearing.

Gun drawn, the officer entered the tavern. He saw only a bartender, a female and a man sitting at the bar facing the front door, who is the petitioner in this case (S.11-12). Petitioner had a surprised look on his face when he saw the uniformed policeman and made a quick move with his hand to the area of the waistband section of his pants (S.12-13). Fearful that petitioner was reaching for a gun, Ventriglio ran over to petitioner, pulled him off the barstool, placed him up against the wall, and patted him down (S.13). In the waistband area of petitioner's pants, the officer found a loaded .38 caliber Colt revolver (S.13). Petitioner was then arrested (S.15).

The motion to suppress was denied. It is this order petitioner challenges.

POINT I

The Police Officer's Conduct Was Justified By The Eyewitness Account And The Officer's Corroborating Observations.

Petitioner contends that the information supplied by the witness, Anthony Sabella, did not furnish a sufficient factual predicate for Police Officer Ventriglio's intrusion. His argument is premised upon the proposition that Sabella was an untested informant, and that more corroboration of Sabella's account was required before Ventriglio could act as he did. Respondents respectfully submit that petitioner's analysis rests on a faulty premise; namely, that information from a witness and information from a police informant are tested by the same standards. We contend that the standards to be applied to witness/victim or to an informant who furnish information predicating police conduct are generally recognized to be different. Moreover, the information supplied by Sabella meets the appropriate standards.

In New York, our courts have recognized that information supplied by ordinary citizens whose identities are known to the police is not to be tested by the same standards applied to paid or anonymous police informants. In *People* v. *Hicks*, 38 NY2d 90, 94 (1975), the Court of Appeals acknowledged that

> [a]s a court, we cannot hold that citizen informers are as inherently suspicious individuals as the underworld denizen upon whose oath, out of necessity, law enforcement officials must rely. To do so, would be to denigrate the character of public spirited citizens.

Thus, the reliability requirement of informants' information as this Court set out in *Spinelli* v. *United States*, 393 U.S. 410, 413-414 (1969) and *Aguilar* v. *Texas*, 378 U.S. 108, 114 (1964), has been less stringently articulated. An ordinary citizen's report of a crime is deemed reliable where his identity is known to the police because such a person risks criminal prosecution if his report is fabricated. *New York Penal Law* § 240.50 (McKinney 1980). *See, People* v. *Hicks, supra; People* v. *Hyter*, 61 App. Div. 2d 990, 991 (2d Dept. 1978); *People* v. *Flanagan*, 56 App. Div.2d 289, 291 (1st Dept. 1977).

The Federal Courts of Appeals have also applied a lesser standard to citizen/witness accounts of wrongdoing. The reliability of the information may be demonstrated where the underlying circumstances show the citizen's first-hand knowledge. *United States* v. *Easter*, 552 F.2d 230, 233 (8th Cir.), *cert. denied*, 434 U.S. 844 (1977). Another factor to be considered is whether there is no apparent motive for providing false information. *United States* v. *Gagnon*, 635 F.2d 766, 768 (10th Cir. 1980); *cf. Pendergast* v. *United States*, 416 F.2d 776, 785 (D.C. Cir.), *cert. denied*, 395 U.S. 926 (1969). Finally, federal courts have considered whether the witness has unequivocally identified the accused. *Pendergast* v. *United States, supra, id.*

Respondents believe that the reliability of Anthony Sabella has met all of the above articulated standards. Police Officer Ventriglio's personal observations of the man exiting the Whisper Inn Lounge and the search of that man, which did not produce the gun,* corroborated Sabella's description, increased the probability that the other man had the gun and enhanced Sabella's credibility. *See, United States* v. *Easter, supra.* Not only was there any absence of an ulterior motive to lie, but Sabella also faced the possibility of a criminal prosecution if he lied. *See, United States* v. *Gagnon, supra.* Moreover, Sabella unequivocally identified the first man exiting the lounge. *Pendergast* v. *United States, supra.*

Respondents respectfully maintain that, by the application of any rational standard, Sabella must be considered reliable as a source of information.

Given Sabella's reliability, we submit that Ventriglio's subsequent conduct was eminently reasonable under the circumstances. When Ventriglio entered the bar, only one male patron, petitioner, was present. Petitioner's quick movement with his hand to the waistband area of his pants gave Ventriglio sufficient cause for the pat down frisk which revealed the gun. *Pennsylvania* v. *Mims*, 434 U.S. 106, 111-112 (1977); *Terry* v. *Ohio*, 392 U.S. 1 (1968); *People* v. *Chestnut*, 51 NY2d 14, 21 (1980). Thus, the trial court's order denying petitioner's motion to suppress was proper.

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* Petitioner does not challenge, nor does he have standing to challenge, the search of the first man exiting the bar. *See, United States* v. *Salvucci*, 448 U.S. 83 (1980).

CONCLUSION

The petition for a writ of certiorari should be denied in all respects.

Respectfully submitted,

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